In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 711

FORSTER MFG. CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

In 1963, the Federal Trade Commission issued a cease-and-desist order against petitioners, the Forster Mfg. Co., Inc., and its president, upon finding that they had violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) (R. 391)[1] by discriminating in price among purchasers of the firm's woodware products. The case was decided by a panel of three commissioners, one of whom dissented. The panel acted under a Commission rule providing that "a majority of the

[1] R. — refers to the Record Appendix to the Brief for the Petitioners in the court below.

members of the Commission constitutes a quorum for the transaction of business." (16 C.F.R. (Cum. Supp. Jan. 1, 1966) 1.7; see Annual Report of the Federal Trade Commission 1916, p. 49.)

Petitioners challenged the order in the Court of Appeals for the First Circuit on various grounds, but they did not question the authority of the two commissioners to enter a valid order. The court of appeals set aside the order, holding that the agency had applied an erroneous standard in rejecting the respondents' defense that the price discriminations had been given to meet competition; and remanded the case to the Commission (R. 469). *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47, certiorari denied, 380 U.S. 906. After further proceedings the Commission—all five members participating and one commissioner not concurring (not the commissioner who had dissented originally)—again ruled against petitioners (R. 495–530), and entered a modified cease-and-desist order (R. 531–532). Petitioners again sought review in the First Circuit. In this second review proceeding, they urged for the first time on oral argument that the original three-member panel had no authority to enter the original order because only two members had concurred therein. The court of appeals rejected the argument without considering its merits, on the ground that petitioners should have raised the point on their prior appeal; overruled petitioners' other challenges to the order; and dismissed the petition to review (Pet. App. 10–14, 361 F. 2d 340).

The sole question presented is whether the second order is invalid because the full Commission relied upon findings made by the two-commissioner majority in the earlier proceeding. There admittedly is a conflict among the circuits on the question whether such a majority may enter a valid order. The Commission has sought review on the question in *Federal Trade Commission* v. *Flotill Products, Inc.*, No. 668, this Term, and has not opposed review on the question in *Purolator Products, Inc.* v. *Federal Trade Commission*, No. 61, this Term, both pending on petitions for writ of certiorari. In the *Purolator* case in which, unlike *Flotill*, the point was not raised in the court of appeals, the Commission suggested that "it would [nevertheless] appear appropriate for the Court to consider" it, since it "may involve the jurisdiction of the Commission" (Supplemental Memorandum for the Federal Trade Commission, No. 61, this Term, p. 2).

In the present case the issue arises in a significantly different context. The case is like *Purolator* in that the petitioners here also failed to raise the point before the court of appeals on direct review of the order entered by the three-member panel. Unlike *Purolator*, however, where the court of appeals affirmed the two-member order, here the court of appeals reversed that order and remanded the case to the agency for further proceedings, and on such remand the full Commission reconsidered the case. Thus, the failure of petitioners to raise the point on the first appeal denied the Commission the opportunity it otherwise would have had to cure any defect by

reconsidering on remand those aspects of its decision that the court of appeals had not disturbed.

Thus, even though the question of the authority of two members of a three-member panel to enter a valid order may involve the jurisdiction of the agency, sound principles of judicial administration support the ruling of the court of appeals that, in the particular circumstances of this case, the respondents' failure timely to raise the point made it inappropriate for the court to consider it when raised for the first time on the second appeal. Cf. *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36. Moreover, although the full Commission apparently treated the first opinion of the court of appeals as not requiring it to reconsider anything other than the issue upon which the remand was directed (R. 496), the full Commission did participate in the entry of the new and superseding order which petitioners here challenge.

In the circumstances, we believe that there is no occasion for the Court to review this case together with *Flotill* and *Purolator* and we therefore respectfully submit that the petition for a writ of certiorari should be denied.

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